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AMENDMENTS TO THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

MARCH 8 (legislative day, FEBRUARY 22), 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1640]

The Committee on the Judiciary, to which was referred the bill (S. 1640) to amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*), relating to surreptitious entries to install electronic intercept devices and to an emergency exception for life-endangering situations, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended pass.

AMENDMENTS

(1) On page 2, strike out lines 17 through 22 and insert in lieu thereof the following:

> (g) a statement whether surreptitious entries are required to carry out the order.

(2) On pages 2 and 3, beginning with line 23 on page 2, strike out through line 11 on page 3.

(3) On page 3, line 12, strike out "4." and insert in lieu thereof "3.".

(4) Beginning on page 3, strike out lines 19 through 13 on page 4 and insert in lieu thereof the following:

> (f) whether surreptitious entries are authorized or approved to carry out the order, and, if such entries are authorized or approved, the identity of the agency authorized to make the surreptitious entries.

(5) On page 4, line 14, strike out "5." and insert in lieu thereof "4.".

(6) On page 5, line 5, strike out "6," and insert in lieu thereof "5."; strike out lines 8 through 12 and insert in lieu thereof the following:

> "(f) the face that surreptitious entries to carry out the order were authorized or approved;" and;

and in line 15, strike out "7." and insert in lieu thereof "6.".

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Purpose of Amendments

The amendments eliminate from the bill as introduced (1) the requirement that the application for an electronic surveillance involving surreptitious entry divulge the various methods available for electronic monitoring and discuss the relative merits of each method in order to justify approval of a method requiring a surreptitious entry; and (2) the requirement that the government report and justify surreptitious entries that become necessary in the course of the ongoing investigation to repair, replace, or remove the device.

These amendments bring the bill into conformity with the current practice and meet FBI concerns about possible compromise of advanced electronic surveillance methods and the merits of each method. See Report of the Department of Justice, *infra*.

HISTORY OF LEGISLATION

S. 1640 was introduced by Senator Thurmond on September 18, 1981. The bill as introduced is similar to measure (S. 1717) introduced by Senator Edward M. Kennedy in the 96th Congress as it passed the Senate on June 9, 1980, by voice vote. Hearings were held on S. 1717 on March 5, 1980.[1] S. 1640 was held in full Committee this Congress based on the extensive record already developed. Similar provisions are also included in S. 1630, the Criminal Code Reform Act of 1981, introduced by Senator Thurmond on September 17, 1980.

Statement

GENERAL

The purpose of the bill is two-fold: to establish uniform statutory procedures for the use of surreptitious entries to install court-authorized electronic eavesdropping devices and to provide for emergency interceptions of wire and oral communications in life-endangering situations.

S. 1640 requires that, when a surreptitious entry is necessary for the installation of a court-authorized electronic intercept device, the applicant for the order must state in his application that such an entry will be required to effect the interception and that the intercept order itself specifically state whether a surreptitious entry is authorized.

S. 1640 also permits the emergency interception of wire and oral communications in situations involving the immediate danger of death or serious bodily injury subject to the same conditions for emergency interceptions currently permitted by title III.

TITLE III AND SURREPTITIOUS ENTRIES

Over a decade ago, Congress enacted title III of the Omnibus Crime Control and Safe Streets Act of 1968[2] which is a "comprehensive scheme for the regulation of wiretapping and electronic surveillance."[3] Title III, which was an effort by Congress to protect

[1] Hearings on S. 1717 before the Subcommittee on Criminal Justice of the Senate Committee on the Judiciary, 96th Cong., 2d Sess. (1980) (hereinafter cited as Hearings).
[2] Public Law No. 90-351, 82 Stat. 197 (June 19, 1968), codified at 18 U.S.C. 2510-2520 (1970) (hereinafter cited as Title III).
[3] *Gelbard* v. *United States*, 408, U.S. 41, 46 (1972).

the privacy of individual thought and expression while promoting more effective control on crime,[4] was drafted to meet the constitutional requirements for electronic surveillance enunciated by the Supreme Court in *Berger* v. *New York* and *Katz* v. *United States*.[5] The statute sets forth both the standards which must be met and the procedures which must be followed before a court can authorize the interception of wire or oral communications.

The interception of such communications can be accomplished in two very different ways: "wiretapping" or "bugging". Wiretapping is limited to the interception of communications which take place over telephone or telegraph lines and generally can be accomplished by tapping the exterior lines outside the premises where the telephone or telegraph is located. Bugging, however, is used to intercept conversations which take place within a certain premise. It requires the installation of a microphone or other electronic intercept device in the room where the conversations take place, which conversations are then transmitted to a nearby receiver. Installation of these devices can usually be accomplished only by means of a surreptitious or covert entry onto the target premises by an agent.[6]

Microphones are used in only a limited number of cases by federal law enforcement agencies; only 13 percent of the court-authorized intercepts have used this method. From 1968–1978, of the 1,445 intercepts installed, 182 were microphones.[7] Wiretaps have been used mainly when the telephones have been located in a residence, and microphones have generally been used when the conversations occur at a business location.[8]

The limited use of microphones can be linked to a number of factors. In many instances, information relating to the criminal activity under investigation can be obtained through a wiretap. If this information provides sufficient evidence to substantiate a subsequent prosecution, a microphone eavesdrop would be unnecessary, and its use might, in fact, jeopardize the information being obtained on the wiretap.[9] One of the principal reasons, however, for the infrequent use is the fact that microphone eavesdrops require a surreptitious entry to install, maintain, and remove the microphone. As the Assistant Attorney General for the Criminal Division of the Department of Justice, stated:

> For the most part, interception of wire communications can be accomplished by tapping exterior lines. Therefore, surreptitious entry generally is not required for the interception of wire communications. On the other hand, the interception of oral communications usually necessitates the placement of a concealed microphone on the premises. Sur-

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[4] S. Rept. No. 1097, 90th Cong., 2d sess., 66 (1968); see *United States* v. *Kahn*, 441 U.S. 143, 151 (1974).

[5] *Berger* v. *New York*, 388 U.S. 41 (1966); *Katz* v. *United States*, 389 U.S. 347 (1967). See S. Rep. No. 1097, 90th Cong., 2d sess. 90 (1968).

[6] Hearings at 5–6 (testimony of Philip B. Heymann); *id.* at 12 and 20 (testimony of Lee Colwell).

[7] Letter from James A. McCafferty (Apr. 30, 1979) reprinted in 126 Cong. Rec. S11882–S11883 (daily ed. Sept. 5, 1975), and in Hearings at 100–104.

[8] 64 percent of the wiretaps were on telephones located in residences; only 20 percent of the microphones were installed in residences; 17 percent of the wiretaps were on business phones; 50 percent of the microphones were located on business premises. *Id.* (These figures do not include combined locations).

[9] Hearings at 19 (testimony of Lee Colwell).

> reptitious entry is then required to install, maintain and remove these microphones. In these cases, the executing officers must proceed with a surreptitious entry both to protect the secrecy of the interception and to assure their own safety.[10]

These entries are not only difficult to undertake but also are dangerous for the agents. The difficulty of installing a microphone stems from both the manpower requirements and the amount of preparation needed to ensure that the entry remains undetected. In order to accomplish this, law enforcement officers must make extensive and time-consuming target surveys in order to gather the information necessary for an informed decision regarding the time and method of entry. 24-hour surveillance teams must often be used for a long period of time to gather this information, to determine the normal patterns and routines not only of the suspects but also of citizens in the area, and to decide what methods of entry and exit are likely to be successful.[11]

A key concern whenever a surreptitious entry is needed to install a microphone is the safety of the agents. The possibility of accidental detection by either a citizen or one of the suspects which could lead to a physical confrontation is a major concern. Not only would the investigation be seriously jeopardized but also, and more importantly, innocent people could be injured. As a consequence, the Federal Bureau of Investigation uses covert entry only if no other alernative installation method is available.[12] In nearly all title III eavesdrop situations, however, a surreptitious entry is necessary since no other method—short of having a source or agent with the technical expertise in place—is available to install the device on the premises in a way that will guarantee that the conversations will be intercepted and that the intercept device will not be discovered.[13]

Until recently, the authority of Federal agents to enter the target premises to install court-authorized eavesdropping devices was neither challenged nor questioned. During the past few years, however, Federal appellate courts which have considered the issue have handed down conflicting decisions which have had the result of confusion rather than resolution of the issue.[14] It was not until April of 1979 that the Supreme Court, which had twice previously declined to consider the question, finally resolved the conflict.

In *Dalia* v. *United States*,[15] the Supreme Court held that the Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment,[16]

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[10] *Id.* at 9 (statement of Philip B. Heymann). See also *id.* at 56 (statement of Kenneth J. Hodson).

[11] For a detailed discussion of these target surveys and the problems which can arise, see McNamara. "The Problems of Surreptitious Entry To Effectuate Eavesdrops: How Do You Proceed After the Court Says 'Yes?'," 15 Am. Crim. L. Rev. 1, 2–4 and nn. 7–11 (1977).

[12] Hearings at 12 (testimony of Lee Colwell). The FBI installs nearly all of the title III microphone intercepts. Id. at 13 and 19 (testimony of Lee Colwell). The Drug Enforcement Administration has used them only rarely. Letter from Peter Bensinger to Senator Patrick J. Leahy (Feb. 29, 1980), reprinted in Hearings at 61 (hereinafter cited as Bensinger letter).

[13] Hearings at 9 (statement of Philip B. Heymann); id. at 13 (testimony of Lee Colwell); Bensinger letter, *supra* n. 12, at 61; letter from Philip B. Heymann to Senator Patrick J. Leahy (Mar. 31, 1980), reprinted in Hearings at 89 (hereinafter cited as Heymann letter).

[14] See *United States* v. *Finazzo*, 583 F. 2d 837 (6th Cir. 1978); *United States* v. *Santora*, 583 F. 2d 453 (9th Cir. 1978); *United States* v. *Scafidi*, 564 F. 2d 633 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978); *United States* v. *Ford*, 553 F. 2d 146 (D.C. Cir. 1977); *United States* v. *Agrusa*, 541 F. 2d 690 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977).

[15] 441 U.S. 238 (1979).

[16] Id. at 248.

that Congress intended to confer power upon the courts to authorize covert entries ancillary to their responsibility to review and approve surveillance applications under Title III,[17] and that the Fourth Amendment does not require that a title III electronic surveillance order include a specific authorization to enter covertly the premises described in the order.[18] The Court repeatedly noted, however, that the manner in which these entries were executed would be subject to later judicial review as to their reasonableness.[19]

Although the Supreme Court held that a specific covert entry provision was not a required part of a title III intercept order, it stated that the "preferable approach" would be for Government agents to make explicit to the authorizing court their expectation that some form of surreptitious entry would be required to carry out the surveillance.[20] The Court noted that this approach had been the policy of the Department of Justice for some time.[21] Not only does the Department's policy require that the application for a title III intercept order state that the use of a surreptitious entry is expected, but also requires that specific authorization for such entry must be included in the court's order.[22] The provisions of this legislation essentially incorporate the long-standing policy of the Department of Justice.

The basis of the Department of Justice policy is the recognition of the particularly intrusive nature of surreptitious entries and the appropriateness of judicial consideration of their use in effecting electronic surveillance.[23]

These same concerns for privacy prompted the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance to recommend that title III be amended to provide for specific court authorization of surreptitious entries when necessary to implement a court-authorized electronic surveillance.[24] The President endorsed this recommendation in his message to Congress regarding wiretapping and electronic surveillance on April 3, 1979.[25]

These amendments relating to surreptitious entries do not preclude the use of such entries, since at times they are the only practical means of installing a court-authorized intercept device which will produce evidence of a serious crime. Rather these amendments would subject such entries to the scrutiny and approval of an informed, neutral judicial officer.[26]

These amendments recognize, however, the need for flexibility in executing the surreptitious entry. Law enforcement officers may en-

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[17] Id. at 254.
[18] Id. at 258–259.
[19] Id. at 249 and 257–258.
[20] Id. at 259, n. 22.
[21] Id. This policy is currently set forth in "United States Attorney's Manual," 9–7. 180. at 17–18 (Nov. 8, 1978).
[22] Id. 9–7921, at 57; see Hearings at 8 (statement of Philip B. Heymann); id. at 12 (testimony of Lee Colwell); see Heymann letter *supra*, n. 13 at 91.
[23] Id. at 8–9 (statement of Philip B. Heymann); Besinger Letter, *supra* note 12 at 60–61.
[24] National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electric Surveillance, "Electronic Surveillance," 18 and 83 (1976) (hereinafter cited as "National Wiretap Commission Report").
[25] H.R. Doc. No. 96–87. 96th Cong., 1st sess. 2 (1979), reprinted in 15 Weekly Compilation of Presidential Documents 588 (Apr. 9, 1979).
[26] Since these procedures are not constitutionally mandated, *see Dalia* v. *United States*, *supra* note 15 and accompanying text, this legislation does not effect State law enforcement officers or relevant State statutes. It is anticipated, however, that States would use this legislation as a model for similar provisions regulating surreptitious entries.

counter unforeseen circumstances which may require a change in the time or method of entry or which may require additional entries to adjust or repair the intercept equipment.[27] The Executive Assistant Director of the Federal Bureau of Investigation discussed the need for this flexibility:

> Our experience in case after case has shown that due to a number of unforeseeable variables, it is often impossible to predict the time or method of entry. In one case, our Agents were unable to effect an installation for eight consecutive days and nights before being successful on the ninth day. These variables include uncontrollable circumstances wherein "street traffic" is such that a decision is made to delay an attempted entry. Sometimes we have found it too risky to make an approach to the target location for the purpose of surveying the location until the actual entry is attempted, therefore precluding any preknowledge of the method of entry. Often the method of entry is changed when our Agents reach the outer perimeter of the target location.[28]

Because of the both unforeseeable and uncontrollable variables which inevitably arise as problems before and during these entries, law enforcement officers need a great amount of flexibility to set the optimum time and conditions for entry and to ensure both the security of the investigation and the safety of the officers.[29] These amendments recognize the need for this flexibility for both the initial entry to install the intercept devices and any subsequent reentry to repair, adjust, replace, or remove the devices.

Life-endangering exception

S. 1640 amends Title III in one further regard: it provides statutory authority for an emergency interception of wire and oral communications in life-endangering situations.

Title III currently permits emergency interceptions in situations which relate to "conspiratorial activities threatening the national security" [30] and "conspiratorial activities characteristic of organized crime." [31] In these situations, however, grounds must exist for obtaining a court order under Title III, and an application for such an order must be made within 48 hours after the interception has occurred.[32] These exceptions have been invoked by the Attorney General in very few instances since the passage of title III, and these instances have usually involved serious threats to life.[33]

The type of situations intended to be included within this exception generally would relate to those involving the taking of a hostage, the

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[27] Hearings at 9 (statement of Philip B. Heymann) Heymann Letter, *supra* note 13 at 89–92. See also Hearings at 57–58 (statement of Kenneth J. Hodson).

[28] *Id.* at 13. From 1969–75, approximately 12 percent of the title III intercept orders could not be effected because of entry problems. McNamara, *supra* note 11 at 2 n. 6. See also National Wiretap Commission Report, *supra* note 24 at 86.

[29] See McNamara, *supra* note 11 at 4 nn. 9–11.

[30] It is anticipated that many interceptions concerning national security matters would now be governed by the Foreign Intelligence Surveillance Act of 1978. Public Law No. 95–911, 92 Stat. 1785 (codified at 5 U.S.C. 1801–1811 (1978)). See Hearings at 10 n. 6 (statement of Philip B. Heymann).

[31] 18 U.S.C. 2518(7)(a).

[32] 18 U.S.C. 2518(7).

[33] Hearing at 11 (statement of Philip B. Heymann); Heymann Letter, *supra* note 13 at 95–96.

kidnapping of a victim, or the planning of an execution.[34] These and similar situations involve serious and immediate threats to the life of innocent victims, and the use of electronic surveillance would focus more on the prevention of serious injury or death to that victim than it would on the collection of evidence which would be of secondary importance at the time. As one witness testified:

> In addition to obtaining the evidence of a planned crime or crime in progress, the proposed provision would allow us to react immediately in a way to better assure the safety of the victim. For example, we could identify the kidnapper, the intentions of the kidnapper, the location of the victim, or better negotiate the safe release of hostages. The FBI could more effectively anticipate the subject's moves and be in a better position to resolve the crisis without loss of life. Such information would be acquired through a tap on a phone, a microphone secured in a house or in a getaway car.[35]

A spokesman for the Department of Justice testified about past and future situations in which the need for such emergency authority was and would be necessary:

> Situations have arisen and may arise in which terrorists or felons, while holding hostages, use an available telephone to arrange with associates a strategy to force action on their demands or a plan of escape. Similarly, there may be situations in which plans for an imminent murder are learned, but the location or identity of the victim is unknown or law enforcement authorities are otherwise unable to take measures to assure his safety. In such situations, the interception of communications may be necessary to protect the lives of the hostages or victims, yet time for obtaining a court order may not be available.[36]

In preparation for hearings on the predecessor legislation, the Committee requested a number of federal law enforcement agencies to review their investigative files for instances in which such emergency interception would have been a valuable investigative tool. Case studies were received from the Federal Bureau of Investigation [37] and the United States Secret Service [38] which underscored the critical need for this emergency exception.

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[34] *Id.* at 14 (testimony of Lee Colwell); *id.* at 6–7 (testimony of Philip B. Heymann); Heymann Letter, *supra* note 13 at 97.

[35] *Id.* at 14 (testimony of Lee Colwell).

[36] *Id.* at 10–11 (statement of Philip B. Heymann). See also Heymann Letter, *supra* note 13 at 97.

[37] The Federal Bureau of Investigation submitted the following case studies which demonstrated the past need for this provision:

"MARK ANTHONY HAYNES; DONNA CRAIG, VICTIM; HOBBS ACT—COMMERCIAL INSTITUTION

"On October 4, 1979, a then unknown subject, lated identified as Mark Anthony Haynes, residing in Atlanta, Georgia, entered the Executive Office of Edward W. Rabin, Jr., Regional Vice-President and General Manager, Hyatt-Regency Hotel, 265 Peachtree Street, N.E., in downtown Atlanta, Georgia. The subject immediately demanded twenty thousand dollars after producing a handgun. Mr. Rabin agreed to obtain the twenty thousand dollars, and left the Executive Office, leaving Ms. Donna Craig, a Hyatt-Regency Executive Secretary as hostage with Haynes in the Executive Office. Mr. Rabin notified the Atlanta Bureau of Police Services, and the Atlanta FBI.

"Telephone negotiations were established between the hostage negotiators and the subject, such negotiations continued off and on for the next twenty hours. During that period, a brief glimpse of the subject at the window of the office revealed that he was armed with a

The current procedural requirements of title III are time-consuming and effectively preclude immediate response to a life-threatening situation. As one witness testified:

> The requirements of a non-emergency Title III intercept are such that from the beginning stages of an affidavit prep-

handgun. During other periods when there was no telephone contact with the subject, the status and welfare of the hostage were unknown.

"On October 5, 1979, as a result of the hostage negotiations, the subject was given twenty thousand dollars, whereupon he released the hostage. He proceeded to a taxi parked at the entrance to the Hyatt-Regency, which was to be the getaway vehicle pursuant to the negotiations. He entered the vehicle, and when it would not start, he gave up without further incident.

"Reconnaissance efforts undertaken during the investigation indicated that a microphone could have been placed in the ceiling directly above where the hostage and the subject were located. If such a procedure had been available, it would have been extremely valuable in monitoring the conversation between the subject and hostage, and more accurately assessing the danger to the hostage.

"PABLO MARCANO GARCIA; NYDIA ESTHER CEUVAS RIVERA; PUERTO RICAN NATIONLIST TAKEOVER OF CHILEAN CONSULATE, JULY 3, 1978

"On July 3, 1978, the Chilean Consulate to Puerto Rico was taken over by force by Marcano and Cuevas. They were holding an unknown number of hostages, including Roman Gonzalez Ruiz, the Honorary Consul of Chile.

"Negotiations for the release of the hostages were immediately instituted. During the negotiations, the abductors continuously threatened the lives of the hostages should their demands not be met. It was determined that emergency authority for wire or oral communications interception could not be granted under Title III in this case.

"That day, the Attorney General of the United States authorized application to a Federal Judge of competent jurisdiction for an order authorizing the interception for a period of ten days of wire and oral communication in connection with the investigation of the possible violations of Title 18, United States Code, involving murder, kidnaping, or extortion.

At approximately 10:50 a.m., on July 4, 1978, the abductors surrendered to the Federal Bureau of Investigation, having been satisfied through the negotiating process that their demands were met to the degree required. An attempt was made to secure Title III authority under normal procedures; however, this surrender occurred before authority could be granted.

"The availability of wire and oral intercepts from the very inception of the hostage situation would have aided in the negotiation process immeasurably by furnishing information concerning their arms, and details about their plans so that the FBI could better anticipate their moves.

"UNKNOWN SUBJECT; CARY SAYEGH—VICTIM; KIDNAPING

"On October 25, 1978, Cary Sayegh, six years old, disappeared from the Albert Einstein School playground in Las Vegas, Nevada, between 12:00 noon and 12:30 p.m. At approximately 3:30 p.m., on the same date, the family received a telephone call from the alleged abductor who stated he wanted $500,000 ransom, and would call back midday, Friday, October 27, 1978, with further instructions. As of this day, the family has received no additional telephone calls, Cary Sayegh is still missing, and the case unsolved.

"Early in the investigation, a suspect was developed and interviewed several times. The suspect advised that he was in no way connected with the kidnaping case, however, he did state that the kidnapers had contacted him and asked that he be the intermediary between the kidnapers and the Sayegh family. As the result of this alleged position, this suspect stated that he would be receiving telephone calls at certain pay telephone booths from the kidnapers involving further negotiations on the delivery of the child and the ransom money to be paid. He provided little other assistance. Surveillance of this suspect conducted by the FBI reflected that he apparently received telephone calls from several pay telephones. According to the suspect, one of these telephone calls provided information as to the whereabouts of one of the boy's shoes. The boy's shoe was found by the family in the location where the suspect told them it would be found.

"It was during the time when the suspect was allegedly making and receiving telephone calls to the kidnapers that emergency authorization for wire communication interception would have been most valuable in determining if such kidnapers existed, and if so, their identities. In addition the technique could have possibly contributed towards location of the victim since the victim's whereabouts may have been discussed during the calls.

"LARRY DONALD SMATH; CAROLYN MARYANN BEALER, VICTIM; HOBBS ACT—COMMERCIAL INSTITUTION

"On August 23, 1979, Mr. Lawrence Paul Fox, a partner in the Active Construction Clean-up Company, Los Angeles, California, received a telephone call from his sister, Carolyn Maryann Bealer. She advised her brother that she had just been kidnaped. Her abduction was subsequently confirmed at that time, by an unidentified male telephone caller, who later demanded $100,000 cash ransom for her release. By the use of a consensually monitored telephone conversation and telephone call tracing, Larry Donald Smith was developed as a suspect during the late evening of August 25, 1979. On August 26, 1979, Larry Smith voluntarily submitted to an interview with the FBI, after having contacted the Newport Beach Police. He admitted making all the telephone calls in this matter and stated that he had been coerced and forced to participate in the kidnap ransom plan by two

> aration until it is signed by the issuing judge takes a minimum of two days working around the clock. The average amount of time required for achieving routine Title III intercepts is approximately two weeks; therefore, foreclosing our ability to acquire immediate evidence in life-threatening situations." [39]

This situation could be compounded and the time-frame extended by a number of other factors: a judge may not be available because of the time of day or the location of the offense, or the very agents who would be called upon to prepare the necessary written affidavits may be in the midst of negotiating with the hostage-takers or locating the victims.[40]

In the past, when life-endangering situations have arisen, the Department of Justice and the Federal Bureau of Investigation have attempted to interpret the statutory exception relating to "conspiratorial activities characteristic of organized crime" as broadly as possible in order to save the life of the threatened victim or hostage,[41] but this was done "with some stretching, both of conscience and of statutory language." [42] While a legal argument could possibly be made that either the activities fell within the exception or that there was no legitimate expectation of privacy on the part of the criminal,[43] title III should be amended to authorize such necessary investigative efforts. As Assistant Attorney General Heymann stated:

> In light of the exigency of those situations in which human life is threatened, there seems to be no reason why Title III

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unknown males. Smith has since been prosecuted, convicted, and sentenced in this matter. Carolyn Bealer has not been located as of this date, and is feared to have been murdered.

"Emergency authorization for wire communication interception on the residential telephone of Larry Smith from the time he was developed as a suspect could have greatly contributed to the safety of the victim, by leading possibly to the identities of the unknown males and location of the victim.

"HANAFI MUSLIM SECT (HMS), WASHINGTON, D.C.; DOMESTIC SECURITY INFORMATION CONCERNING

"On March 9, 1977, 12 armed men identified as members of the HMS forced their way into the B'nai B'rith International Headquarters, the Washington, D.C., District Government Building, and the Islamic Center in Washington, D.C. (WDC). During the initial stages of these hostage situations, a number of individuals were injured, one fatally, and more than 100 hostages were taken and held. On the morning of March 11, 1977, these individuals surrendered to Metropolitan Police Department (MPD) and at that time, were fully identified. Ernest Timothy McGhee, also known as Hamaas Abdul Khaalis, was identified as the leader of this sect.

"The U.S. Attorney for the District of Columbia authorized emergency interception of telephone communications in the B'nai B rith and District Buildings under Title 23, Section 23–548(a) of the D.C. Code which parallels Title 18, Section 2518, of the U.S. Code. Invaluable information concerning arms possessed by the subjects, their identities, the conditions of the hostages and the ultimate intent of the subjects was obtained through these wiretaps. There was delay in the obtaining of this emergency authorization due to the unclear nature of the emergency provisions."

Id. at 17–19 (statement of Lee Colwell).

[38] The U.S. Secret Service submitted the following case study which demonstrated the past need for this provision:

"In a situation where a conspiracy against the life of the President was discovered hours or even one or two days prior to the arrival of the President and only a single suspect had been identified, these provisions might apply. Although physical surveillance of that single suspect could preclude adverse action on his part, wire interception of the suspect's telephone and/or oral interceptions from his residence could determine the scope of the conspiracy and assist in identifying others involved, thus neutralizing the threat." Id. at 47 (statement of H. Stuart Knight).

[39] Id. at 14 (testimony of Lee Colwell).

[40] Id. at 11 (statement of Philip B. Heymann).

[41] Id. at 14 (testimony of Lee Colwell); see id. at 7 (testimony of Philip B. Heyman).

[42] Id. at 10 (statement of Philip B. Heymann).

[43] See id. at 6 (testimony of Philip B. Heymann); Heymann Letter, *supra* note 13 at 95–96.

> should omit a specific provision for emergency authorization in these instances. While we believe that in those relatively infrequent occasions in which emergency interceptions in life-endangering situations have been authorized by the Department, there has been a legal basis for such action, the statute is not as clear as it should be that life-endangering situations as a distinct category, are covered. Certainly, it should not be necessary to have to strain the present language to act in the interest of saving human life, by making a determination that the situation involves, e.g., "conspiratorial activities characteristic of organized crime." Title III, which in all other respects fully addresses in a straightforward manner those issues which may arise involving electronic surveillance, should speak clearly to authorize the use of emergency surveillance power in this most compelling situation.[44]

The life-endangering exception is grounded in sound constitutional doctrine and Fourth Amendment case law.[45] As Senator Kennedy stated:

> It has long been recognized that exigent circumstances justify conducting a warrantless search, and this same principle should apply to the interception of wire or oral communications. Where an interception would be authorized under Title III if there were time to obtain a court order, and where such an interception could be instrumental in preventing death or serious injury, as in a kidnapping or hostage situation, a law enforcement officer should have at his immediate disposal this valuable investigative tool.[46]

Adoption of this amendment, which has been recommended by the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance [47] and endorsed by the last two Administrations, various federal law enforcement agencies, and the American Bar Association,[48] would have the effect of having title III which "is intended to cover the waterfront of electronic surveillance" [49] reflect current law and meet a demonstrated need. Since no one challenges the legality or importance of an exception in a life-endangering situation, title III should be amended to reflect clearly that this authority exists.

Agency Views

Included and made a part of this report is a letter of January 28, 1982, from the Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to the Chairman of the Committee recommending enactment of the proposed legislation with certain amendments.

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[44] Id. at 10 (statement of Philip B. Heymann) (emphasis in original).
[45] *Warden* v. *Hayden*, 387 U.S. 294 (1967). See Hearings at 84–85 (memorandum of Prof. Clifford S. Fishman).
[46] 126 Congressional Record S11,880 (daily ed. Sept. 5, 1979); see Hearings at 11 (statement of Philip B. Heymann).
[47] National Wiretap Commission Report, *supra* note 24 at 15–16 and 111–113.
[48] Hearings at 53–55 (statement of Kenneth J. Hodson). See also "ABA Standards Relating to the Administration of Criminal Justice." "Electronic Surveillance," 2–5.2(1) (1978).
[49] Hearings at 7 (testimony of Philip B. Heymann).

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, D.C., January 28, 1982.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on S. 1640, a bill "[t]o amend certain provisions of title 18, United States Code, relating to the procedures for interception of wire or oral communications."

RECOMMENDATION

The Department of Justice recommends enactment of this legislation amended as suggested below.

DISCUSSION

S. 1640 would amend Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*), the statute which governs the interception of wire and oral communications. This bill is identical to S. 1717 of the 96th Congress which was passed by the Senate in June 1980.

The amendments to Title III set out in S. 1640 address two distinct issues: emergency authority to conduct interceptions in life endangering situations and the use of surreptitious entries by law enforcement officers to install, maintain, and remove interception devices. The Department strongly endorses that portion of the bill which would provide clear authority to conduct interceptions of communications without prior court order in situations in which there is an immediate threat to human life. However, with respect to that aspect of S. 1640 which requires specific court authorization of any surreptitious entry necessary to effect an interception, we are concerned that the detailed procedures required for obtaining such authorization which are now incorporated in the bill are not only unnecessarily burdensome, but may also require disclosure of sensitive information concerning our investigative techniques. Amendments to cure these problems but retain the concept of requiring notice to the judge of the potential necessity of surreptitious entry and specific authorization in the court's order of such entry are provided in the discussion below.

We have also suggested that S. 1640 be used as the vehicle for adding the crime of wire fraud (18 U.S.C. 1343) and sexual exploitation of children (18 U.S.C. 2251 and 2252) to the list of federal offenses for which an interception order may be authorized to obtain evidence.

Emergency interception in life endangering situations

Generally, Title III requires that law enforcement officers obtain prior court authorization before conducting electronic surveillance of private communications.[1] However, 18 U.S.C. 2518(7) provides authority for emergency interceptions without a prior court order in two instances: first, when an emergency situation exists with respect

[1] Interception of private communications by law enforcement officers constitutes a search and seizure under the Fourth Amendment, and therefore must be based on probable cause, and generally must be authorized in advance by a judge. See *Berger* v. *New York*, 388 U.S. 41 (1967); *Katz* v. *United States*, 389 U.S. 347 (1968).

to "conspiratorial activities threatening the national security" and second, when an emergency situation exists with respect to "conspiratorial activities characteristic of organized crime." Section five of S. 1640 would add to these conditions under which emergency wiretap authorization is permissible the situation in which the offense involves an "immediate danger of death or serious physical injury to any person." S. 1640 would leave unchanged the other requirements of 18 U.S.C. 2518(7) which must be met in order to obtain emergency authorization, including the requirements that sufficient grounds exist that a court order could have been obtained but for the need for immediate action arising out of the emergency situation, and that an application for a court order approving the interception be made within forty-eight hours.

In light of the exigency of those situations in which human life is immediately threatened, the Department has been concerned that Title III fails to designate specifically such circumstances as an appropriate basis for the emergency interception of communications. While some life-in-danger situations may arise out of the activities of organized crime, it is likely that many such cases in which the ability to move quickly to intercept communications may be vital to protection human life would not fall within the present scope of the statute's exception for "conspiratorial activities characteristic of organized crime."

Situations have arisen and will continue to arise, in which terrorists or felons, while holding hostages, use an available telephone to arrange with associates a strategy to force action on their demands or a plan of escape. In such situations, interception of these communications may be necessary to protect the lives of the hostages, yet time for obtaining a court order is not available. Section five of S. 1640 would make it clear that an interception without prior court authorization would be permissible in such cases.

The bill's proposed life-in-danger amendment is fully in accord with the constitutional teachings of the Supreme Court. In the context of the Fourth Amendment, the Court has recognized generally that the existence of an emergency requiring an immediate search is justification for dispensing with the need to obtain a prior warrant from a court. See, e.g. *Warden* v. *Hayden*, 387 U.S. 294 (1967). Clearly, the same principle applies to searches and seizures by electronic interception, particularly in the limited circumstances in which human life is imminently endangered. Indeed, it is plain that the justification for the narrow emergency wiretap authority proposed in S. 1640—the protection of human life—is at least as compelling as the present statutory bases on which such an emergency interception may be authorized.

In sum, the Department strongly supports that portion of S. 1640 that would enlarge the emergency electronic interception provisions of Title III to include the concept of imminent danger to human life.

Requirements for obtaining court authorization of surreptitious entries necessary to carry out an interception of communications

Other than section five of S. 1640, which addresses the emergency life-in-danger amendment discussed above, the remaining sections of

the bill are designed to amend Title III to require specific court authorization of any surreptitious entry needed to carry out an interception and to create certain procedures for obtaining this authorization. These amendments include: (1) a requirement that an application for an order authorizing the interception of communications state whether the use of surreptitious entry will be necessary to effect the interception, and if so, why other means of effecting the interception would be unlikely to succeed, too dangerous, or impracticable; (2) a requirement that the court find, in order to authorize a surreptitious entry, that the entry is necessary because other means are unlikely to succeed, etc.; (3) a requirement that the court order for the interception specify whether a surreptitious entry to effect the interception is authorized; (4) a requirement that the court be given written notice (in advance, whenever practicable) of an reentry to repair, reposition, or remove an interception device; and (5) a requirement that the statistical reports on Title III interceptions prepared by the Administrative Office for United States Courts include the number and purpose of all surreptitious entries used in carrying out interception orders.

While Title III provides for the interception of both wire and oral communications, and the interception of oral communications generally requires the placement of a concealed microphone,[2] the statute presently contains no provision addressing the use of surreptitious entries to install or remove interception devices. S. 1640's amendments to Title III concerning surreptitious entry are a response to the Supreme Court's decision in *Dalia* v. *United States*, 441 U.S. 238 (1979), in which the Court held first that the "Fourth Amendment does not prohibit *per se* a covert entry performed for the purpose of installing otherwise legal electronic bugging equipment," [3] second, that in light of the legislative history of Title III, Congress intended to authorize the courts to order the interception of communications in situations in which a covert entry onto private premises would be necessary, and third, that the Fourth Amendment did not require the court ordering the interception to specifically authorize the use of surreptitious entry in its order.

With respect to this third aspect of its holding, the Court reasoned that the Fourth Amendment generally does not require a court to review and approve in advance the particular means by which a warrant is to be executed, and further noted that, in any event, the interception of oral, as opposed to wire, communications usually will require a surreptitious entry to install an interception device and thus "we would promote empty formalism were we to require magistrates to make explicit what unquestionably is implicit in bugging authorizations: that a covert entry, with its attendant interference with Fourth Amendment interests, may be necessary for the installation of surveillance equipment." [4] Nonetheless, the Court did state that the "preferable approach" would be for officers to make explicit to the court their expectation that some form of surreptitious entry might

[2] The interception of wire communications can generally be achieved by tapping exterior lines, and thus does not usually require a surreptitious entry.
[3] 441 U.S. at 248.
[4] Id. at 258.

be necessary to effect the interception, and cited with approval the Department's policy, still in effect, which requires that whenever it appears that a surreptitious entry may be necessary to carry out an interception, the Title III application should request that the order authorize the appropriate agents to make surreptitious entries to install, maintain, or remove any devices to be used on the interception.

Unfortunately, S. 1640 goes beyond simply codifying the Department's current policy regarding surreptitious entry by introducing additional detailed procedural requirements that not only cause us to be concerned about the unwarranted application of Title III's suppression remedy, but that are also unnecessarily burdensome and may, in some instances, be detrimental to effective law enforcement.

The Department is very much concerned that section two of the bill, which requires as part of the application for an interception order in which surreptitious entry is anticipated, a factual statement as to "why other means of effecting the interception reasonably appear to be unlikely to succeed, to be too dangerous, or otherwise to be impracticable," would cause investigative agencies to provide a detailed factual discussion of investigative techniques, and an assessment of their capabilities or weaknesses. This would unnecessarily provide the criminal element with information concerning the limitations of law enforcement in certain sensitive investigative areas. In our view, creation of this opportunity for disclosure of such information is not in the public interest.

Furthermore, requiring the submission of the factual basis for the necessity of using surreptitious entry, and requiring, as set out in section three of the bill, that the issuing court make a finding of such necessity before authorizing surreptitious entry, would be a hollow exercise that would do nothing to serve the interests at issue when a court is considering an interception order. As discussed above, the interception of oral communications must virtually always be accomplished through placement of a concealed microphone. The use of surreptitious entry in such cases is a practical necessity; it is not simply one of a variety of alternative means of effecting the interception. Thus, it would be an unusual case in which there would be any real issue for the court to consider in determining whether a surreptitious entry might be necessary to effect an interception of oral communications.

Moreover, it is unlikely that law enforcement officers would resort to the use of surreptitious entry if effective alternative means of carrying out the interception order were available. Accomplishing a surreptitious entry will often place investigative officers in a dangerous situation, and thus there is no incentive to use this method unless it is clearly necessary.

These same concerns apply with respect to the final portion of section four of the bill which requires that after the initial entry to install the interception device, if there is a need to make an additional entry to repair, replace, reposition or remove the device, the court is to be given written notice, in advance unless not practicable, of the anticipated reentry and the reasons that require such a reentry. The reasons for any reentry during the course of the interception will generally be technical problems with the device or measures taken by the

subjects which may have rendered the device ineffective. Thus, this section will also require a discussion of the limitations of our investigative techniques. Furthermore, reentry to remove the device will always be necessary when the objective of the interception has been met or the order has expired.

The premise of the bill's requirement of advance written notice to the court of every instance in which a reentry appears to be necessary seems to be that it is appropriate for the court, even after it has specifically authorized the use of surreptitious entry, to become deeply involved in the manner in which the order is executed because the fact of any reentry raises a question that the surreptitious entry authority spelled out in the order may be being abused. As noted above, at least one reentry will always be necessary to remove the device, and any other reentries will generally be necessitated by technical problems with the device, problems which should not concern the issuing judge and which indeed will often be beyond his area of expertise. The Department sees no reason why the initial authorization of surreptitious entry should not be sufficient to authorize any entry which may be required to carry out the order.

In sum, we believe that it would be sufficient if Title III were amended to require simply that the application for an interception order specify whether it is anticipated that surreptitious entries may be required to accomplish the interception, and to require that the order itself state whether such entries are authorized. These amendments would apprise the issuing court of the fact that an entry onto private premises might be necessary to carry out the order, and require that the agents have specific authority in order to conduct any such entry. This formulation would avoid the problems discussed above, yet assure that the court had an opportunity to include in its assessment of the reasonableness of the order requested, the fact that surreptitious entry might be required. It is noted that nothing in this formulation would preclude the judge, if a case were to arise in which he had doubts about the asserted necessity of surreptitious entry, to conduct a further inquiry into this issue before entering the requested order.

Therefore, the Department strongly recommends improving the surreptitious entry provisions of S. 1640 by amending them in the following manner:

1. Amend the provisions regarding the inclusion in the application of a factual statement explaining why means of effecting the interception other than surreptitious entry would not be effective by deleting on page two of the bill lines 17 through 22, and substituting the following language for the proposed new section 2518(1)(g): "(g) a statement whether surreptitious entries may be required to carry out the order."

2. Delete the requirement set out in section three of the bill that the issuing court find that means of effecting the order other than surreptitious entry will be ineffective or impracticable. This would be accomplished by deleting the last line on page two of the bill and deleting lines 1 through 11 on page three. Sections four through six of the bill would then be redesignated as sections three through five, respectively.

3. In present section four of the bill, revise the language regarding the authorization for surreptitious entry in the court order and remove

the requirement of written notice to the court of any reentry and its purpose by deleting on pages three and four lines 19 through 24 and lines 1 through 13, respectively, and substitute the following: "(f) whether surreptitious entries are authorized or approved to carry out the order, and if such entries are approved or authorized, the identity of the agency authorized to make the surreptitious entries.".

4. Delete the reporting requirements regarding the number and purpose of any surreptitious entries, in conformance with the amendments suggested above, by deleting lines 8 through 12 on page five of the bill and substituting the following: "(f) the fact that surreptitious entries to carry out the order were authorized or approved; and".

Amendments to 18 U.S.C. 2516

The Department also suggests that in its consideration of S. 1640, the Committee consider an additional amendment to Title III that would add the offenses of wire fraud (18 U.S.C. 1343) and those regarding the sexual exploitation of children (18 U.S.C. 2251 and 2252) to the list of offenses in 18 U.S.C. 2516 for which electronic interceptions are permitted. The ability to use Title III to obtain evidence of the commission of these offenses would greatly enhance the Department's prosecutive efforts in these areas.

In the case of wire fraud, the offense itself consists of the use of wire communications to execute a fradulent scheme.[5] Thus, the failure of Title III to permit the interception of such communications deprives federal officers of the ability to obtain, in many cases, what is obviously the most compelling evidence of the offense. In light of the nature of the offense of wire fraud, it is in our view eminently sensible that Title III should permit the interception of the very communications that constitute the offense. Indeed, it seems odd that Title III presently permits the use of electronic interceptions to obtain evidence of bankruptcy fraud, but does not permit such interceptions in cases which directly involve the use of interstate or foreign wire communications to commit a fraud. This defect in current law was recognized and cured in S. 1630, the criminal code revision bill currently before the Senate.

In 1978, the Congress enacted two new offenses, 18 U.S.C. 2251 and 2252, to address specifically the alarming problem of child pornography. These statutes make it a federal offense, punishable by up to ten years' imprisonment, to use children in the production of films and photographs depicting sexual activities, as well as to distribute such materials. The Department of Justice has directed its investigators and prosecutors to give priority to these cases.

Despite the emphasis we have placed on child pornography cases, prosecution of those who violate 18 U.S.C. 2251 or 2252 has been difficult In cases involving the sexual exploitation of children, as is true with many other types of criminal offenses, the best means of investigating and prosecuting these violations would be through interviewing the victims and securing their testimony before grand juries, and ultimately, at trial. However, in child pornography cases, because of the age of the victims and the understandable reluctance of parents to permit their children's involvement in judicial proceedings regarding their sexual exploitation, pursuing these traditional methods which

[5] 18 U.S.C. 1343 also reaches the use of radio or television to commit a fraud.

focus on the ability of the victim to provide substantial evidence concerning the offense is often not possible. Not only are the victims of child pornography often so youthful or so emotionally distressed as a result of their experiences that they cannot provide extensive information and testimony about their exploitation, but also, because of our responsibility to protect the interests of these child victims, we must at times decide against requiring them to recount in court the brutal degradation they have already experienced and to be subject to extensive cross examination.

For these reasons, it would be extremely advantageous if 18 U.S.C. 2516 were amended to permit electronic interception when the underlying offense is a violation of 18 U.S.C. 2251 or 2252. Much of the business of child pornography takes place in offices and over the telephone. Being able to conduct electronic surveillance of such conversations would greatly enhance our ability to obtain convictions in this area. In addition, we are aware of the involvement of organized crime in these offenses, particularly in the distribution of child pornography, and Title III has traditionally permitted the use of wiretaps to obtain evidence of offenses in which there is significant organized crime involvement. Thus, the Department strongly recomends that S. 1640 include an amendment to extend the scope of 18 U.S.C. 2516 to add violations of 18 U.S.C. 2251 and 2252, as well as the wire fraud offense discussed above, to the present list of federal offenses for which an interception of communications may be ordered to obtain evidence.

CONCLUSION

The Department of Justice strongly recommends enactment of that portion of S. 1640 that would provide emergency interception authority in cases involving an immediate threat to human life, and would support the surreptitious entry provisions of the bill if amended as suggested above. In addition, the Department urges that S. 1640 be used as an appropriate vehicle for establishing authority to conduct interceptions in cases involving wire fraud and the crimes of sexual exploitation of children.

The Office of Management has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
Assistant Attorney General,
Office of Legislative Affairs.

SECTION-BY-SECTION ANALYSIS

SECTION 1

This section amends section 2510 of Title 18, which sets forth the definitions of the terms employed in title III, by defining the term "surreptitious entry". "Surreptitious entry" is defined to mean a "physical entry upon a private place or premises to install, repair, reposition, replace, or remove any electronic, mechanical, or other device". "Electronic, mechanical, or other device" is already defined

in section 2510 to reach those devices which are used to intercept wire or oral communications.

The term "surreptitious entry" includes both covert entries and entries effected by ruse or subterfuge. Thus, the procedures governing surreptitious entry are to be followed whether the anticipated mode of entry is a physical break-in or the use of a pretext such as a bomb scare or utilities inspection. Inasmuch as each of these modes of gaining entry constitute physical intrusions into private premises, it is appropriate that specific court authorization for either type of entry be sought. Indeed, the Court in *Dalia* v. *United States*, 411 U.S. 238 (1979), was of the opinion that both modes of entry were equally intrusive.

It is not intended that "surreptitious entry" include an entry which has been authorized by an occupant of the premises, or which a person, such as a landlord or common carrier, has been directed to cooperate with the officers executing the order pursuant to section 2518(4). However, in the later case, if an entry on to private premises is required, such entry must be authorized by the court. Nor are any entries onto public places intended to be characterized as "surreptitious" entries, even though a ruse or subterfuge might be used to protect the security of the interception or the safety of the officers.

SECTION 2

18 U.S.C. 2518(1) describes the information which must be included in an application for an order authorizing or approving the interception of wire or oral communications. Section two of the bill would amend current section 2518(1) by requiring that the application state whether surreptitious entry is required to effect the interception.

The provisions of section two would alert the issuing judge of the fact that a surreptitious entry was anticipated. These amendments to 18 U.S.C. 2518(1) would not require the applicant to demonstrate that surreptitious entry is the only means of effecting the interception.

SECTION 3

Section three of the bill amends 18 U.S.C. 2518(4) to require that the order authorizing or approving the interception specifically state whether a surreptitious entry to effect the interception is authorized. The Supreme Court held in *Dalia* v. *United States*, 441 U.S. 238 (1979), that, while judges issuing title III interception orders had the power to authorize such entries, the Fourth Amendment did not require that the order specifically authorize such entry. The Court reasoned that an order authorizing interception of oral communications implicity authorized a surreptitious entry to position a device that would intercept the targeted conversations. These amendments will ensure that the issuing court is, in fact, aware that a surreptitious entry will be used to effect an interception and that the court specifically authorizes a surreptitious entry in the interception order.

In rare cases, it may be necessary for Federal agents to enter the premises of a person, for instance a corporate headquarters, in order to gain access to the premises of the target of the intercept order, such

as the office of an employee of that corporation. In such cases, the Federal agents should inform the court of these circumstances, and the entry provision of the court's order should reflect the authority of the agents to enter these premises.

In addition to requiring that the order state whether surreptitious entry is authorized, section three provides that the interception order shall identify the agency authorized to make the entry.

The notification provisions will not require the submission of an application for, or the entry of, a new order to authorize additional surreptitious entries to replace, maintain, reposition, or remove an interception device in the course of the authorized interception period. Inasmuch as "surreptitious entry" is defined to include an entry made for the purposes of installing, repairing, repositioning, replacing, or removing an interception device, an order authorizing "surreptitious entry" would include a grant of authority to make such subsequent entries.

Section three as it was originally drafted in S. 1717 in the 96th Congress contained a provision which required the attorney for the government to notify the issuing court of the time and method of entry. The purpose of this provision was to enable the court to make an initial determination regarding the reasonableness of the entry. Although this notification was to be of a general nature, that is, the attorney for the Government was to indicate whether the entry would be by ruse, subterfuge, or break-in, a number of witnesses raised serious concern about the provision.

The major concerns related to the fact that there are relatively few methods of gaining entry onto private premises without detection, and most of these are used not only for criminal investigations but also for foreign counterintelligence activities. Details about the method of entry could compromise a cooperating source if entry were to be gained through use of a passkey, and subsequent use of the method in another investigation could be jeopardized if those involved in criminal activity became aware of the details.

While the Supreme Court in *Dalia* noted that any entry to install a court-authorized electronic intercept device would be subject to the Fourth Amendment standard of reasonableness, this determination can best be made in the context of the actual facts and circumstances surrounding each entry. The Committee was further persuaded that preentry notification and determinations of reasonableness of the method of entry by the court would unnecessarily interject the court into the investigative process and require it to make operational determinations better left to law enforcement officers. This approach also ensures that officers executing the oral intercept order have the required flexibility as to the time and method of entry which will provide for the security of the investigation and the safety of the officers.

SECTION 4

The authorization of emergency interceptions without prior court approved is governed by section 2518(7), of title 18. Section four of this bill contains the two amendments to section 2518(7). Currently, this section of Title III permits the authorization of an interception

without a prior court order in only two instances: first, when an emergency situation exists with respect to "conspiratorial activities threatening the national security" and second, when such an emergency exists with respect to "conspiratorial activities characteristic of organized crime." Section four of the bill would add as a third permissible basis for the authorization of an emergency interception the existence of a situation which involves an immediate danger of death or serious physical injury. The other requirements governing emergency interceptions set forth in section 2518(7) would remain unchanged. These current requirements include a provision that there must have existed sufficient grounds that a court order could have been obtained but for the fact that the emergency situation required immediate action, and that an application for an order approving the interception be made within 48 hours.

It is a well established principle that the existence of exigent circumstances requiring immediate action is justification for conducting a warrantless search. There is no reason why this same principle should not apply in the area of interception of communications, particularly in view of the narrowly drawn basis for emergency authorization set forth in this amendment. Certainly, an immediate threat of danger to human life is an equally, if not a more compelling justification for emergency interception than the current statutory basis set out in section 2518(7).

Situations have arisen and may again arise in which terrorists or felons while holding hostages, use an available telephone to arrange with associates a strategy to force action on their demands or a plan of escape. In such a situation, interception of communications may be necessary to protect the lives of the hostages, yet time for obtaining a court order is not available. This amendment to section 2518(7) of title 18 would make it clear that an emergency interception may be authorized without prior court approval when there is imminent danger to human life.

The Committee intends that the term "immediate danger" be interpreted in a commonsense fashion. In most cases, there will be little doubt about the immediacy of the danger, especially if hostages have been already taken or victims kidnaped. Likewise, if Federal agents know that a crime which threatens the life or safety of a victim will be or may be committed before an intercept order can be obtained, this exception would clearly apply.

The Committee is concerned about one final situation in which Federal agents learn of a crime which will occur in the future, for example, the assassination of a political candidate at a convention which will be held several weeks hence or the bombing of a governmental facility to coincide with a particular historical event, but the planning for which will take place before an intercept order can be obtained. In these rare instances the life-endangering exception is intended to apply since such electronic surveillance may be the best or even the only opportunity to foil the plot by revealing the identity of the intended victim or the details of the plot. Without such surveillance, the danger of death or serious physical injury to the intended victim increases significantly.

The Committee is concerned about the potential for abuse in this last situation, but believes that the safeguards in title III which require the Attorney General's authorization for the intercept and the possibility of a civil suit for damages for improper surveillance will substantially reduce the possibility of abuse. A similar exception currently exists for similar conspiratorial activities in organized crime and national security cases, and the Committee is unaware of any abuse of this authority.

The second amendment to section 2518(7) contained in section four of this bill simply provides that an emergency interception authorized under 18 U.S.C. 2518(7) may be effected by means of a surreptitious entry. As under current law, an application for an order approving an emergency interception must be made within 48 hours, and the application and the order, if granted, would be required to conform with the provisions set forth in this bill concerning surreptitious entry, if such an entry were made in the course of an emergency interception.

SECTION 5

Section 2519 of title 18 currently provides that certain information concerning title III interceptions be reported to the Administrative Office of the U.S. Courts. Section five of this bill would amend 18 U.S.C. 2519 to require that the fact that surreptitious entries were authorized in the course of an interception also be included in the reported information.

Compilation of this data will enable Congress and others interested in the use of eavesdropping for law enforcement purposes to assess the extent to which surreptitious entries are used to effect title III interceptions.

SECTION 6

This section merely corrects the paragraph references in section 2519(2) to reflect the addition of a new paragraph two, and redesignation of current paragraphs of, section 2519(1) in section six of the bill.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., March 3, 1982.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Dirksen Senate Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1640, a bill to amend certain provisions of title 18, United States Code, relating to the procedures for interception of wire or oral communications, as ordered reported by the Senate Committee on the Judiciary, March 2, 1982.

The bill would authorize electronic eavesdropping in certain emergency situations without a prior court order and would establish cer-

tain procedures governing surreptitious entry by government agents for purposes associated with the interception of wire or oral conversations. Based on this review, it appears that no additional cost will be incurred by the federal government as a result of enactment of this legislation.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

In compliance with paragraph 5, Rule XXVI of the Standing Rules of the Senate, it is hereby stated that the Committee anticipates that the bill will have no additional direct regulatory impact. After due consideration, the Committee has determined that the changes in existing law contained in the bill will not increase or diminish any present regulatory responsibilities of the U.S. Department of Justice or of any other department which exercises a law enforcement responsibility.

VOTE OF COMMITTEE

The Committee, by voice vote, approved S. 1640, as amended in Committee, on March 2, 1982.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

* * * * * * *

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

2510. Definitions

As used in this chapter—

* * * * * * *

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; [and]

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed[.]*; and*

(12) "surreptitious entry" means a physical entry upon a private place or premises to install, repair, reposition, replace, or remove any electronic, mechanical, or other device, and includes both covert entry and entry effected by means of a ruse or subterfuge.

* * * * * * *

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * * * * * *

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; **[**and**]**

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results**[**.**]**; *and*

* * * * * * *

(g) a statement whether surreptitious entries are required to carry out the order.

* * * * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

* * * * * * *

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person**[**.**]**; *and*

(e) where the order is to authorize or approve a surreptitious entry, such surreptitious entry reasonably appears to be required to effect the interception because means of effecting the interception other than surreptitious entry reasonably appear, if tried, to be unlikely to succeed, to be too dangerous, or to be impracticable.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

* * * * * * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; **[**and**]**

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall auto-

matically terminate when the described communication has been first obtained[.]*; and*

(f) whether surreptitious entries are authorized or approved to carry out the order, and, if such entries are authorized or approved, the identity of the agency authorized to make the surreptitious entries.

* * * * * * *

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State who reasonably determines that—

[(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and]

(a) an emergency situations exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime, that requires a wire or oral communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire or oral communication, *and may make any surreptitious entry required to effect such interception*, if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

* * * * * * *

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

* * * * * * *

(f) the fact that surreptitious entires to carry out the order were authorized or approved;

[(f)] (*g*) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

[(g)] (*h*) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through [(g)] (*h*) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar years;

○

Calendar No. 455

97TH CONGRESS 2d Session } SENATE { REPORT No. 97-320

CONGRESSIONAL, CABINET, AND SUPREME COURT ASSASSINATION, KIDNAPPING, AND ASSAULT

MARCH 10 (legislative day, FEBRUARY 22), 1982.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 907]

The Committee on the Judiciary, to which was referred the bill (S. 907) to amend section 351 of title 18 of the United States Code to include Cabinet officers, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute and an amendment to the title, and recommends that the bill, as amended, pass.

AMENDMENT

Strike out all after the enacting clause and insert in lieu thereof the following:

That (a) subsection (a) of section 351 of title 18, United States Code, is amended to read as follows:

"(a) Whoever kills any individual who is a Member of Congress or a Member-of-Congress-elect, a member of the executive branch of the Government who is the head of a department listed in section 101 of title 5 or the second ranking official in such department, or a justice of the United States, as defined in section 451 of title 28, or a person nominated to be a justice of the United States, during the pendency of such nomination, shall be punished as provided by sections 1111 and 1112 of this title.".

(b) The section heading for section 351 of such title is amended to read as follows:

"§ 351. Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault; penalties".

(c) In the table of sections of chapter 18 of such title amend the item relating to section 351 to read as follows:

"351. Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault; penalties.".

(d) The chapter analysis of chapter 18 of such title is amended to read as follows:

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"CHAPTER 18—CONGRESSIONAL, CABINET, AND SUPREME COURT ASSASSINATION, KIDNAPPING, AND ASSAULT".

(e) The table of contents to "Part I—Crimes" of title 18 is amended by striking out the chapter reference to chapter 18 and inserting in lieu thereof the following:

"18. Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault ..... 351".

(f) Paragraph (1)(c) of section 2516 is amended by striking out the parenthetical phrase following "or section 351" and inserting in lieu thereof the following:
"(violations with respect to Congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault)".

SEC. 2. (a) Subsection (a) of section 1751 of title 18, United States Code, is amended to read as follows:
"(a) Whoever kills (1) any individual who is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the Office of the President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States, or (2) any person employed in the Executive Office of the President or in the Office of the Vice President authorized to receive an annual rate of pay equal to that which applies for positions at level II of the Executive Schedule, shall be punished as provided by sections 1111 and 1112 of this title.".

(b) Subsection (e) of section 1751 of such title is amended to read as follows:
"(e) Whoever assaults any person designated in subsection (a)(1) shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever assaults any person designated in subsection (a)(2) shall be fined not more than $5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than $10,000, or imprisoned not more than ten years, or both.".

(c) Subsection (c) of section 1751 of such title is amended by deleting "this section" and inserting in lieu thereof "subsection (a)(1)".

(d) The section heading for section 1751 of such title is amended to read as follows:

"§ 1751. Presidential and Presidential staff assassination, kidnapping, and assault; penalties".

(e) In the table of sections of chapter 84 of such title amend the item relating to section 1751 to read as follows:

"1751. Presidential and Presidential staff assassination, kidnapping, and assault; penalties.".

(f) The chapter analysis of chapter 74 of such ttile is amended to read as follows:

"CHAPTER 84—PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION, KIDNAPPING, AND ASSAULT".

(g) The table of contents to "Part I.—Crimes" of title 18 is amended by striking out the chapter reference to chapter 84 and inserting in lieu thereof the following:

"84. Presidential and Presidential staff assassination, kidnapping, and assault ..... 1751".

(h) Paragraph (1)(c) of section 2516 of such title is amended by striking out the parenthetical phrase following "section 1751" and inserting in lieu thereof "Presidential and Presidential staff assassination, kidnapping, and assault; penalties)".

Amend the title to read:

A bill to amend sections 351 and 1751 of title 18 of the United States Code to provide penalties for crimes against Cabinet officers, Supreme Court justices, and Presidential staff members, and for other purposes.

Purpose of Amendment

S. 907 as introduced by Senator Thurmond on April 8, 1981, would have made it a Federal crime to murder, kidnap, or assault a Cabinet officer. The purpose of the amendment is to expand the bill's coverage to include Supreme Court Justices and nominees, senior Presidential and Vice Presidential aides and the second ranking individual in each Cabinet department, as well. Attempts or conspiracies to commit any of the above offenses would also be covered.

General Statement and History

CURRENT LAW

Federal law currently prohibits the killing, assault, or kidnapping of a Member of Congress or Member of Congress-elect,[1] the Vice President or Vice President-elect, or any individual acting as President under the Constitution or laws of the United States.[2] Conspiracies or attempts to commit any of these crimes are also punishable under Federal law.[3]

With few exceptions, such crimes are not specifically prohibited by Federal law when committed against a Cabinet officer or senior departmental, Presidential or Vice Presidential staff member. However, the killing or assault of any person, including these high government officials, is currently a Federal crime if the unlawful act occurs within the "special maritime and territorial jurisdiction of the United States."[4] Similarly, kidnapping is a Federal crime if the victim is transported in interstate commerce.[5] Absent the unusual application of some special statute illustrated by these two provisions, however, the killing, assault, or kidnapping of a Cabinet officer or senior departmental, Presidential, or Vice Presidential staff member would have to be prosecuted under State law or the provisions of the District of Columbia Code.

In addition, the current status of acts of violence against Justices of the Supreme Court is unclear. Section 1114 prohibits the killing of a "judge of the United States," and section 111 prohibits the assault of any person mentioned in section 1114. However, it is unclear whether or not the phrase "judge of the United States" includes members of the Supreme Court. One definition of the phrase, found in another statute, excludes Supreme Court Justices.[6] Another includes Members of the Court.[7] Neither definition by its terms applies to Section 1114. The Department of Justice, however, has long considered the phrase to exclude members of the Supreme Court. Thus the killing, assault, or kidnapping of a Supreme Court Justice may currently have to be prosecuted under State law or the provisions of the District of Columbia Code.

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[1] 18 U.S.C. 351.
[2] 18 U.S.C. 1751.
[3] *See* 18 U.S.C. 351(c) and (d); 18 U.S.C. 1751(c) and (d).
[4] 18 U.S.C. 111, 1111–14; *see* 18 U.S.C. 7 (defining "special maritime and territorial jurisdiction of the United States").
[5] 18 U.S.C. 1201.
[6] 28 U.S.C. 451.
[7] Rule 54(c), F.R.Crim.P.

History of S. 904 and S. 907

As introduced, S. 907 would haxe extended to each Cabinet officer, defined as the head of a department listed in 5 U.S.C. 101, the protection accorded to, among others, Members of Congress, the President, and the Vice President. Under the bill, violent crimes against Cabinet officers would be punished as Federal offenses without a showing that the crime was connected with their official duties. In its June 11, 1981 Report to the Committee on the Judiciary, the Department of Justice recommended that S. 907 be extended to cover a murder, kidnapping, and assault perpetrated againt the second ranking official in each department. The Department noted that "... these officials frequently act for the Cabinet officer and generally share his or her responsibilities."

A second bill dealing with violent crimes against senior government officials, S. 904, was introduced by Senator Quayle on April 7, 1981. S. 904 would have made it a Federal offense to assassinate, assault, or kidnap "any person traveling on official business with the President or Vice President." In introducing the bill, Senator Quayle stated:[8]

> As the tragedy that befell President Reagan's press secretary, James Brady, graphically illustrated, these staff members are often in danger equal to that of the President and law officials assigned to protect him. I see no reason to exclude such staff members from the protection of the full legal penalties of the Presidential assassination statute.

In its report of July 6, 1981, the Department of Justice recommended both a narrowing and broadening of S. 904 as introduced. The Department suggested that the bill be narrowed so as to limit coverage to a small group of senior Presidential and Vice Presidential aides, but to broaden the coverage by eliminating the requirement that the aides be travelling on official business with the President or Vice President.

On September 22, 1981, the Senate Judiciary Subcommittee on Criminal Law held a hearing on S. 904 and S. 907. At the hearing, D. Lowell Jensen, Assistant Attorney General, Criminal Division, testified on behalf of the Department of Justice in support of the general thrust of the bills and suggested certain amendments as indicated. By unanimous poll completed on December 2, 1981, the members of the Subcommittee on Criminal Law voted to report favorably S. 907 to the full Judiciary Committee with an amendment in the nature of a substitute.

Explanation of the Amendment

S. 907, as amended, combines certain aspects of both S. 904 and S. 907. It also would extend protections to a category of individuals not covered by either of the bills: Supreme Court Justices and nominees. Specifically, the proposed amendment to S. 907 would cover three types of individuals: (1) a Cabinet officer, defined as a "member of the Executive branch of government who is the head of a department listed in section 101 of title 5," and the second ranking official in such depart-

[8] 127 Congressional Record, S3559–60 (Apr. 7, 1981 (daily ed.)).

ment; (2) a Supreme Court Justice and a person formally nominated to fill a vacancy on the Court during the pendency of the nomination; and (3) a senior aide employed in the Executive Office of the President or the Office of the Vice President, defined as a person authorized to receive an annual rate of pay equal to that for positions at level II of the Executive Schedule.

Basis for Federal Jurisdiction

The Committee concluded that there is a strong Federal interest in vindicating crimes of violence directed at these high-level officials. Cabinet members and senior White House aides are key members of the Executive branch. They directly advise the President and play an important role in the formation of public policy. Members of the Supreme Court sit at the zenith of our legal system and are constantly immersed in issues of national importance. Of necessity, all of these officials deal with controversial issues; often they become recognized easily by large numbers of persons. Unfortunately, these factors can make them targets of criminal attack.

In the Committee's opinion, the significance to the government of the United States of the duties performed by these officials, coupled with their high visibility and vulnerability, make it advisable that violent criminal acts against them be subject to Federal sanctions. Although State criminal jurisdiction exists for murder, kidnapping, and assault in all jurisdictions, the Committee believes that Federal resources should be brought to bear immediately when the target of such an offense is a Cabinet officer, Supreme Court Justice or nominee, or senior department or White House official. To do otherwise would be to leave the investigation and prosecution of these matters to States with their greatly diverse investigative resources, criminal trial procedures, and penalties. Moreover, the officials protected under the proposed amendment to S. 907 often travel abroad, where they are currently not even protected by State law. Enactment of S. 907, as amended, would fill this void, as both section 351 and section 1751 apply extraterritorially.

Scope of S. 907 as Amended

Turning to the specific provisions of S. 907, as amended, the Committee concluded that the bill should cover the second ranking official in each executive branch department, as well as the Cabinet member. The Committee intends that the term "second ranking official" be construed to mean the person designated to act for the head of the department in accordance with a delegation of authority or order of succession promulgated by or for the department, without regard to whether the second ranking official is acting within the scope of his or her employment at the time of the offense. The proposed amendment to S. 907 would accomplish these goals by amending the appropriate provisions of section 351 of title 18.

The Committee also concluded that the protections in section 1751 regarding the murder, kidnapping, and assault of the President,

President-elect, Vice President, Vice President-elect, and any other person authorized to serve as President under the Constitution and laws of the United States should be extended to certain Presidential and Vice Presidential aides. In doing so, however, the Committee modified the approach suggested in S. 904. In the Committee's view, these provisions were in one sense too narrow and in another too broad.

The Committee determined that S. 904 was too narrow in that it applied only to instances when the victim was attacked while accompanying the President or Vice President on official business. The Committee concluded that the Federal interest in the protection of *senior* White House officials was sufficiently great to warrant the extension of Federal jurisdiction set forth in the amended version of S. 907, irrespective of whether or not the official was acting wtihin the scope of employment at the time of the alleged offense.

At the same time, however, the Committee concluded that the provisions in S. 904 were too broad in one key respect. Specifically, the Committee decided against providing coverage under section 1751 to all White House personnel traveling with the President or Vice President. As the Justice Department noted in its July 6th Report to the Committee, this provision is "too broad in that it would cover such persons as cooks, maids and valets who frequently are part of a Presidential party on extended trips."

Although the Committee has chosen not to extend section 1751 protections to all Presidential and Vice Presidential personnel traveling with the President or Vice President, it recognized that there may well be merit to providing some coverage for these individuals under our Federal criminal laws. In the Committee's view, however, such possible coverage should be considered in the context of legislation separate from S. 907, as amended, and should be limited to situations where the victim was engaged in official duties at the time of the incident.

As a result, the Committee decided to extend section 1751 coverage to senior Presidential or Vice Presidential aides, irrespective of whether or not the covered individual was performing official duties at the time of the incident. Coverage under the proposed amendment would be restricted to persons employed in the Executive Office of the President or in the Office of the Vice President authorized to receive an annual rate of pay equal to that for positions at level II of the Executive Schedule. The President is authorized to appoint 25 such persons and the Vice President five, in accordance with 3 U.S.C. 105, 106.

Finally, the Committee concluded that S. 907 should also make it a Federal crime to murder, kidnap, or assault a Justice of the United States or a person formally nominated to fill a vacancy on the Supreme Court. In the Committee's view, a Justice or nominee to the Supreme Court should have the same protection accorded the President, President-elect, Vice President, Vice President-elect, a Member of Congress, a Member-elect, and a senior departmental or White House official covered by S. 907, as amended. This goal is accomplished by the amendment to section 351 of title 18. The inclusion of Justices and nominees to the Supreme Court in the bill will also end any doubt as

to whether or not Justices are provided specific protection from criminal attacks. As previously noted, there is some doubt as to the protection afforded a Justice under current Federal statutes dealing with violence against designated Federal officials. The proposed amendment to S. 907 would insure appropriate protections and thus moot any ambiguity under present law.

The Committee intends that Federal jurisdiction will attach under S. 907, without a showing that the attack was motivated by the victim's official status. Moreover, the government need not prove that the assailant knew the "Federal identity" of the victim to establish a violation of the amended version of S. 907. No such showing is required under existing law with respect to a violent crime against the President, Vice President, or Member of Congress, and the Committee believes that this approach should be equally applicable to an individual covered under the proposed amendment to S. 907.

Asserting Federal Jurisdiction

Under both section 1751 and section 351 of title 18, an assertion of Federal jurisdiction suspends the jurisdiction of State and local authorities. There is no specific formality that must be observed for Federal jurisdiction to take effect. These same provisions would apply where the victim of an attack is one of the persons covered by S. 907, as amended. The Committee intends that Federal authorities will consult with their State and local counterparts before asserting Federal jurisdiction under section 1751 or 351. The Committee recognizes, however, that circumstances may arise under which such consultation would be impracticable. In those situations, an immediate assertion of Federal jurisdiction by a Federal officer on the scene would be effective. Regardless of the manner in which Federal jurisdiction is asserted, if Federal involvement in a particular matter is no longer needed or appropriate, the Federal authorities may turn the case over to the appropriate State or local agency.

Use of the Military

Both sections 351 and 1751 of title 18 provide:

> Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any Federal, State or local agency, including the Army, Navy, and Air Force, any statute, rule or regulation to the contrary notwithstanding.

These same provisions would apply where the victim of the attack is one of the individuals covered by S. 907, as amended.

In the Committee's view this language provides only for the participation of the specified categories of governmental entities in the investigation of alleged violations of the sections. For example, it would allow for the Army to participate in the investigation, irrespective of the prohibitions contained in the posse comitatus statute, 18 U.S.C. 1385, but it would not allow disregard of overriding statutory provisions, rules, or regulations governing the manner in which the entity performs its authorized functions.

Rewards

Under section 1751(g) of title 18, the Attorney General is authorized to pay up to $100,000 for information concerning a violation of that section. Section 351 does not contain such a provision. Although S. 907, as amended, expands the coverage of section 1751 to include senior White House aides, the bill expressly provides that the reward provision of section 1751 is not applicable where those officials are the victim of attack. The reward provision will only apply where the victim of an attack is the President, the President-elect, Vice President, the Vice President-elect, the officer next in order of succession to the President if there is no Vice President, or any individual acting as President under the Constitution and the laws of the United States. The Committee does not intend, however, to preclude the application of other provisions of Federal law that authorize the payment of a reward for information or assistance concerning a violation of the criminal laws of the United States. For example, section 3059 of title 18 would be applicable to such attacks against the individuals covered by S. 907, as amended.

Duties of the Secret Service

The Committee believes it important to emphasize that the amendments to sections 351 and 1751 of title 18 proposed under this bill in no way expand the ongoing protective responsibilities of the Secret Service or any other Federal agency. The protective duties of the Secret Service are set forth in section 3056 of title 18, and this provision would be unaffected by the amendments proposed in S. 907.

Section-by-Section Analysis

Section 1 of the bill, as reported, amends section 351(a) of title 18 of the United States Code to make it a Federal crime to kill a Cabinet officer, defined as "a member of the Executive Branch of the government who is the head of a department listed in 5 U.S.C. 101", the second ranking official in each such department, or a Supreme Court Justice or nominee. This protection of Federal law is presently accorded by section 351 to Members of Congress and Members-of-Congress-elect.

Since present subsections (b), (c), (d), and (e) refer to the kidnapping, attempted killing or kidnapping, conspiracy to kill or kidnap, and assaults upon persons named in subsection (a), the effect of this section would be to create Federal jurisdiction over these offenses as well when directed at a Supreme Court Justice or nominee, a Cabinet officer, or his principal deputy. The penalties would presently extend to life imprisonment for the murder, kidnapping, attempted murder or kidnapping, or conspiracy to murder or kidnap such a person. The penalty for an assault on such a person would be a fine of not more than $5,000 or imprisonment for up to one year or both, but if personal injury results the penalty for assault could extend to a $10,000 fine and imprisonment for up to ten years, or both.

Subsection (e) contains a conforming amendment to 18 U.S.C. 2516, which specifies the offenses for which the Attorney General may au-

thorize an application for a warrant to intercept oral or wire communications.

Section 2 of the bill amends section 1751 of title 18 to extend to the most senior officials in the Executive Office of the President and in the Office of the Vice President the same protection presently given to the President and Vice President with respect to murder, manslaughter, kidnaping, and an attempt or conspiracy to commit these crimes. For any of these offenses the penalty could extend to life imprisonment under current law. The officials so protected are persons employed in the Executive Office of the President or in the Office of the Vice President authorized to receive pay at the rate which applies for positions at level II of the Executive Schedule.

Subsection (b) amends subsection 1751(e), dealing with the penalty for assault. The penalty for assault on the President, President-elect, Vice President, Vice President-elect or person next in line to the Presidency, if there is no Vice President, will continue to be up to 10 years' imprisonment and a $10,000 fine. However, the penalty for assaulting one of the Presidential or Vice Presidential aides, added to section 1751(a) by this bill, would be 10 years' imprisonment and a $10,000 fine, or both, only if personal injury results. In other cases, the maximum penalty for an assault on one of the Presidential or Vice Presidential aides would be a $5,000 fine and imprisonment for 1 year, or both. This makes the penalty for assault on a Presidential aide consistent with that for an assault on a Cabinet officer or Supreme Court Justice under section 351.

Subsection (c) amends subsection (g) of section 1751, which provides that the Attorney General in his discretion is authorized to pay up to $100,000 for information and services concerning a violation of the section. Subsection (c) would preclude the application of subsection (g) of section 1751 to those individuals added by the proposed amendment to S. 907.

Subsection (g) contains a conforming amendment to 17 U.S.C. 2516.

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., February 4, 1982.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 907, a bill to amend sections 351 and 1751 of title 18 of the United States Code to provide penalties for crimes against Cabinet officers, Supreme Court justices, the Presidential staff members, and for other purposes, with an amendment in the nature of a substitute, as ordered reported by the Senate Committee on the Judiciary, February 1, 1982.

Based on this review, it is expected that no significant additional cost to the government would be incurred as a result of enactment of this legislation.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

Regulatory Impact Statement

In compliance with paragraph 5, Rule XXVI of the Standing Rules of the Senate, the Committee anticipates that the bill will have no additional direct regulatory impact. After due consideration, the Committee has determined that the changes in existing law contained in the bill will not increase or diminish any present regulatory responsibility of the United States Department of Justice or any other department which exercises a law enforcement responsibility.

Vote of the Committee

On February 2, 1982, the Committee ordered S. 907 favorably reported, as amended in Subcommittee, by a voice vote.

Changes in Existing Law

In compliance with paragraph 12 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by S. 907, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

* * * * * * *

Part I.—Crimes

Chapter	Sec.
13. Civil Rights	241
15. Claims and services in matters affecting government	281
17. Coins and currency	331
[18. Congressional assassination, kidnaping, and assault]	351]
18. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault	*351*
* * * * * * *	
79. Perjury	1621
81. Piracy and privateering	1651
83. Postal Service	1691
[84. Presidential assassination, kidnaping, and assault]	1751]
84. Presidential and Presidential staff assassination, kidnaping and assault	*1751*
* * * * * * *	

[CHAPTER 18.—CONGRESSIONAL ASSASSINATION, KIDNAPING, AND ASSAU

[Sec.
[351. Congressional assassination, kidnaping, and assault; penalties.

[§ 351. Congressional assassination, kidnaping, and assault; penalties

[(a) Whoever kills any individual who is a Member of Congress or a Member-of-Congress-elect shall be punished as provided by sections 1111 and 1112 of this title.]

CHAPTER 18—CONGRESSIONAL, CABINET, AND SUPREME COURT ASSASSINATION, KIDNAPING, AND ASSAULT

§ 351. Congressional, Cabinet, and Supreme Court assassination, kidnaping, and assault; penalties

§ 351. Congressional, Cabinet, and Supreme Court assassination, naping, and assault; penalties.

(a) Whoever kills any individual who is a Member of Congress or a Member-of-Congress-elect, a member of the executive branch of the Government who is the head of a department listed in section 101 of title 5 or the second ranking official in such department, or a justice of the United States, as defined in section 451 of title 28, or a person nominated to be a justice of the United States, during the pendency of such nomination, shall be punished as provided by sections 1111 and 1112 of this title.

* * * * * * *

[CHAPTER 84—PRESIDENTIAL ASSASSINATION, KIDNAPING, AND ASSAULT

[Sec. 1751. Presidential assassination, kidnaping, and assault; penalties.]

CHAPTER 84—PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION, KIDNAPING, AND ASSAULT

§ 1751. Presidential and Presidential staff assassination, kidkidnaping and assault; penalties

* * * * * * *

[§ 1751. Presidential assassination, kidnaping, and assault; penalties

[(a) Whoever kills any individual who is the President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the officer next in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, shall be punished as provided by sections 1111 and 1112 of this title.]

§ 1751. Presidential and Presidential staff assassination, kidnaping, and assault; penalties.

(a) Whoever kills (1) any individual who is the President of the United States, the President-elect, the Vice President, or, if there is Vice President, the officer next in the order of succession to the Office of the President of the United States, the Vice President-elect, or any person who is acting as President under the Constitution and laws of the United States, or (2) any person employed in the Executive Office of the President or in the Office of the Vice President authorize to receive an annual rate of pay equal to that which applies for positions at level II of the Executive Schedule, shall be punished as provided by sections 1111 and 1112 of this title.

* * * * * * *

[(e) Whoever assaults any person designated in subsection (a) of this section shall be fined not more than $10,000 or imprisoned not more than 10 years, or both.]

(e) Whoever assaults any person designated in subsection (a)(1) shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever assaults any person designated in subsection (a)(2) shall be fined not more than $5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

* * * * * * *

(g) The Attorney General of the United States, in his discretion is authorized to pay an amount not to exceed $100,000 for information and services concerning a violation of [this section.] *subsection (a)(1).* Any officer or employee of the United States or of any State or local government who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this subsection.

* * * * * * *

CHAPTER 119—WIRE INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

* * * * * * *

§ 2516. Authorization for interception of wire or oral communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or

injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 [(Presidential assassinations, kidnapping, and assault),] *Presidential and Presidential staff assassination, kidnapping, and assault*), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), sections 2314 and 2315 (interstate transportation of stolen property), section 1963 (violations with respect to racketeer influenced and corrupt organizations) or section 351 [(violations with respect to congressional assassination, kidnaping and assault);] (*violations with respect to Congressional, Cabinet, or Supreme Court assassination, kidnapping, and assault*);

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